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WM. R. STANSBURY
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. ~~358~~ 764

In the Matter of the Petition of the Atchison, Topeka & Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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I.

The Petition for Certiorari Does Not Disclose That This Case Is One of Such Peculiar Gravity and General Importance as to Require a Review by This Court of the Decision of the Circuit Court of Appeals herein, Nor Does It Appear That There Is a Conflict of Decisions Concerning the Statutes Sued On.

Jurisdiction of the Federal Court in this case arises solely upon the ground of diverse citi-

zenship. The suit was originally commenced by respondent, a citizen of California, in the Superior Court of said state in and for the county of Los Angeles against petitioner, a resident of Kansas. The case was removed on motion of petitioner to the Federal District Court for the Southern District of California. There is no Federal question involved. The judgment of the Circuit Court of Appeals is final and if the plaintiff in error is entitled to a writ of certiorari at all, it is only by virtue of section 240 of the Judicial Code. We understand that the power vested in the Supreme Court under said section 240 of the Judicial Code to review final judgments of Circuit Courts of Appeal will not be invoked unless:

1. The circumstances of the case are such as to satisfy this court as to the importance of the question involved.

2. It appears to the court that there is a necessity of avoiding conflict between two or more Federal courts of appeal or between Federal courts of appeal and State courts.

3. The matter involved affects the interests of this nation in its external or internal relations.

Before the petitioner is entitled to a writ of certiorari in this case, it must show that the importance of this case is such that the judg-

ment of the Circuit Court of Appeals should be reviewed or that there is a conflict between the decision of the Circuit Court of Appeals in this case and decisions of other like tribunals or state courts concerning the statute in question, to-wit, section 1820 of the New Mexico statutes. Counsel for petitioner do not advance any argument which would indicate that this case is of such peculiar gravity and importance that this court should grant its petition, but petitioner apparently relies principally upon its contention that there is a conflict of decisions concerning the general question of law involved in this case, but not the statute of New Mexico above mentioned and therefore that its petition for certiorari should be granted by this court. We feel that under the following cases of this court, the petition for writ of certiorari should be denied:

Forsyth v. Hammond (1897) 166 U. S. 506, 17 S. Ct. 665, 41 U. S. (L. Ed.) 1095;

American Construction Co. v. acksonville etc. R. Co. (1893), 148 U. S. 372, 13 S. Ct. 758, 37 U. S. (L. ed.) 486;

Lau Ow Bew, petitioner (1891), 141 U. S. 583, 587, 12 S. Ct. 43, 35 U. S. (L. ed.) 868, 869.

II.

The Decision of the Circuit Court of Appeals in This Case Is Not in Conflict With Any Decision of Either State or Federal Courts Concerning Section 1820 of the New Mexico Statutes.

We understand that this court will only invoke its power to review the judgment of a Circuit Court of Appeals on the ground of a conflict of decisions when the conflict involves some particular statute. So far as we have been able to ascertain, the statute sued on here has never, except in the case at bar, been passed upon by any Federal or State Court other than the State Court of the state of New Mexico in the case of Romero v. Railway Co., 11 N. M. 679, 72 Pac. 37. As the Supreme Court of California has never passed upon this statute, there of course can be no conflict between the decision of the Circuit Court of Appeals and the courts of California. Counsel contend that the general policy of the New Mexico statute is contained in other statutes of various states which have been passed upon by Federal and State Courts and that as the policy of these statutes is more or less similar, the decisions of other courts concerning such statutes should be taken into consideration in determining the question of conflict between the decision of the

Circuit Court of Appeals herein and decisions of other Federal and State Courts involving statutes of a similar nature. We feel that the only question of conflict which concerns us here must be confined to the statute in question. If there are no cases involving this particular statute that are in conflict with the decision of the Circuit Court of Appeals in this case, then there is no actual conflict within the meaning of the rule adopted by this court in granting writs of certiorari where there is a conflict of decisions. Notwithstanding counsel's contention that the decision of the Circuit Court of Appeals in this case conflicts with various other decisions cited by counsel, we contend that this decision is supported by the decisions of the Federal courts including many decisions of this court concerning the enforcement of statutes of a similar nature in a state other than where enacted.

The case of Ryan v. North Alaska Canning Co., 153 Cal. 438, is the only declaration of the Supreme Court of California on the subject of foreign statutes in negligence cases and the same supports the right to enforce the law of another state as there declared, ~~statutes similar to the one in question in this state~~. This case and not the case of McManus v.

Red Salmon Canning Co., 37 Cal. App. 133, cited by counsel for petitioner, establishes the law in the state of California relative to the enforcement of statutes similar to the statute sued on in the case at bar. In the case of Ryan v. North Alaska Canning Co. at page 439, the court said:

> "The demurrer was properly sustained. Where the action as here is transitory in its nature, a right or liability imposed by the statute of another state, or of the United States, may in proper cases be asserted and enforced in this state. Such may be taken to be the settled rule since the case of Dennick v. Railway, 103 U. S. 11. But the courts of this state will only entertain such an action for the purpose and upon the terms permuted by the *lex loci*. In other words, the right to prosecute this action in California is permissible under the laws of Alaska and only upon such terms as the laws of Alaska prescribe."

The case of McManus v. Red Salmon Canning Co., *supra*, cited by counsel, is not, in our opinion, controlling upon the subject in question for the reason that the same is a decision of the District Court of Appeal of California, which is not a court of last resort. (See People v. Davis, 147 Cal. 350; Stratton v. Stratton, 239 U. S. 55.) The opinion in the case of McManus v. Red Salson Canning Co., *supra*, does not deal with the question of enforcement

of penal damages arising under the law of another state or the rule of damages in California. It considers only the question whether one who is neither kin nor dependent of a deceased person may recover damages in California for his death and then decides that question is not involved, hence what is said on the point is *obiter dictum*. In view of the foregoing, we do not believe that it can be said that the case of McManus v. Red Salomn Canning Co. is in conflict with the decision of the Circuit Court of Appeals in this case.

The other cases cited by counsel as being in conflict with the decision in this case are easily distinguishable and a comparison of these various authorities with the decision herein obviates the necessity of argument showing their inapplicability. None of the cases cited by counsel involve section 1820 of the New Mexico statutes. Should counsel find any support in these cases, however, suffice it to say that they only contribute to the minority rule concerning the enforcement of statutes similar to the one sued on and that the decision of the Circuit Court of Appeals herein is in conformity with the majority rule upon said sub-

ject and is supported by the following Federal authorities:

Huntington v. Attrill, 146 U. S. 657-689, 36 L. Ed., pp. 1123-1135;

Dennick v. Central Railway Co., 107 U. S. 17;

Northern Pac. Railway Co. v. Babcock, 154 U. S. 190-203;

Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;

Stewart v. Railway Co., 168 U. S. 445;

Whitlow v. Nashville, Chattanooga & St. Louis Ry. Co., 68 L. R. A., pp. 503-509;

Ill. Central Ry. Co. v. I. H. Lenberg, 75 Fed. 873;

Lauria v. E. I. Dupont DeNemours & Co., 241 Fed. 687;

Mo. Pac. Ry. Co. v. Hune, 115 U. S. 512;

Weissengoff v. Davis, 260 Fed. 17;

Dexter v. Edmans, 89 Fed. 467-473.

"Boston & M. R. R. v. Hurd, 108 Fed. 116, wherein the Circuit Court of Appeals for the First District held that the statute of Massachusetts allowing damages for death on a railroad in a sum not less than $500.00 nor more than $5000 was enforceable in the state of New Hampshire—damages under the New Hampshire law being based upon compensation."

The case of Marshall v. Railway Co., 46 Fed. 269, cited by counsel, was decided before the case of Huntington v. Attrill, 146 U. S. 657, and therefore the value of this decision, whatever it might have been, was destroyed by the opinion of this court in the case of Huntington v. Attrill.

The case of Slater v. Mex. Natl. Ry. Co., 194 U. S. 120, cited by counsel for petitioner, does not support their contention. The dissimilarity of the statutes before the court in that case and in this one is so obvious that argument is unnecessary.

The case of Mo. Pac. v. Ault, 256 U. S. 554, relied upon by counsel is inapplicable to the question before the court in this case, and this case does not attempt to change the rule adopted by this court in the case of Huntington v. Attrill.

The case of Hooper v. Denver etc. Ry., 155 Fed. 273, does not pass upon the enforceability of the statute there involved and therefore is of no aid here. We do not believe that the decision of the various state courts, cited and relied upon by counsel, are entitled to any consideration by this court, as all of these cases undertake to ignore the rule of law established by this court in the case of Huntington v. Attrill.

III.

The contention of counsel for petitioner that the section 1820, of the New Mexico statutes is contrary to the policy contained in section 377 of the Code of Civil Procedure of the State of California is without support. Section 377 of the C. C. P. of this state is a substitute for Lord Campbell's Act and takes away the common law disability to sue for the death of one caused by the wrongful act of another; designates the person who may maintain the action and provides that such damages may be given as under all the circumstances of the case may be just. The Codes of California do not pretend to enact laws with reference to the rights of property or causes of action arising in other states and section 377 C. C. P. providing the measure of damages, has reference to and could only have reference to damages given for the death of a person in California caused by the wrongful act of another in that state. It has never been contended in our judicial procedure that a citizen of the State of California or a stranger for that matter, could not maintain an action in the courts of said state to recover a chose in action arising in another state. California procedure by comity and under constitutional guarantees is open to all who have rights to enforce. Section 377 C. C. P. does not establish a policy against

penal damages in California. For illustration, we instance the penalty provided in California by sections 3347-3348 of the Civil Code in reference to duelling. They are as follows:

> "If any person slays or permanently disables another person in a duel in this state, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance to be determined by the court."
>
> Civil Code, Sec. 3347.
>
> "If any person slays or permanently disables another person in a duel in this state, the slayer is liable for and must pay all debts of the person slain or permanently disabled."
>
> Civil Code, Sec. 3348.

Surely it cannot be said that these sections of the code are measured by the standard of exact compensation, or that they differ in any respect from the New Mexico statute, except that they are more penal in character. Those in reference to the death of duelling are as uncertain and expansive as the wants of the widow and the wants and number of minor children of the person slain. And what could be more drastic or penal than the obligation to pay all

the debts of the person slain or permanently injured.

Other instances of statutory penalties are those shown by sections 3344 and 3345 of the Civil Code in reference to tenants wrongfully holding possession of real property being liable for treble rents as damages; section 3346 providing for treble actual damages for injury to timber, trees, etc.; section 3346A providing for treble damages against one suffering any fire to extend beyond his own land; section 3319 vesting the sound discretion of the jury the question of damages for the breach of promise of marriage, and section 3294 providing for exemplary damages by way of example. The provisions of the above mentioned statutes would not seem to indicate a public policy in California that would exempt a railroad company from its statutory obligation when a passenger is killed by its wrongful act, and there is nothing therein to indicate that the Legislature of California or judicial decisions of its courts intend to deny to a citizen of California his rights arising under the statute of another state. It is a novel argument that the legal procedure of California affords a remedy to one of its citizens for rights arising within the state, but denies a remedy to him for such rights arising in another state.

This action is properly maintainable in the courts of California under the authority of Ryan v. North Alaska Canning Co., 153 Cal. 439, heretofore cited and quoted from.

In conclusion, we respectfully submit that the exigencies of this case are not of such importance as to require this court to grant the petition of plaintiff in error for a writ of *certiorari* nor are the decisions of the Federal courts or State courts concerning the statute in question in conflict with the decision of the Circuit Court of Appeals in this case. For these reasons, the petition for *certiorari* should be denied.

Respectfully submitted,

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Appearing for Plaintiff in Error.